

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Fruitridge Vista Water Company, a trust, for an order: 1) establishing a moratorium on new service connections; and 2) clarification of Tariff Rule 15 regarding payment for new facilities servicing new applicants.	Application 05-10-005 (Filed October 7, 2005)
<p>Sacramento Housing and Redevelopment Agency and the Housing Authority of the County of Sacramento,</p> <p style="text-align: right;">Complainants,</p> <p style="text-align: center;">vs.</p> <p>Fruitridge Vista Water Company,</p> <p style="text-align: right;">Defendant.</p>	Case 05-10-007 (Filed October 11, 2005)
<p>County of Sacramento,</p> <p style="text-align: right;">Complainant,</p> <p style="text-align: center;">vs.</p> <p>Fruitridge Vista Water Company,</p> <p style="text-align: right;">Defendant.</p>	Case 05-10-011 (Filed October 7, 2005)
<p>David R. Gonzalez &amp; Donna L. Gonzalez,</p> <p style="text-align: right;">Complainants,</p> <p style="text-align: center;">vs.</p> <p>Fruitridge Vista Water Company,</p> <p style="text-align: right;">Defendant.</p>	Case 05-09-011 (Filed September 6, 2005)
<p>Mercy Properties California,</p> <p style="text-align: right;">Complainant,</p> <p style="text-align: center;">vs.</p> <p>Fruitridge Vista Water Company,</p> <p style="text-align: right;">Defendant.</p>	Case 05-09-012 (Filed September 6, 2005)
<p>Victoria Station, LLC,</p> <p style="text-align: right;">Complainant,</p> <p style="text-align: center;">vs.</p> <p>Fruitridge Vista Water Company,</p> <p style="text-align: right;">Defendant.</p>	Case 05-09-027 (Filed September 22, 2005)
<p>Park Place LLC,</p> <p style="text-align: right;">Complainant,</p> <p style="text-align: center;">vs.</p> <p>Fruitridge Vista Water Company,</p> <p style="text-align: right;">Defendant.</p>	Case 05-11-015 (Filed November 15, 2005)

## **DIVISION OF RATEPAYER ADVOCATES' COMMENTS ON THE PROPOSED DECISION**

### **I. INTRODUCTION**

Pursuant to Rule 77.7, the Division of Ratepayer Advocates (DRA) comments on the Proposed Decision dated March 28, 2006 (PD), as modified by Administrative Law Judge (ALJ) Ruling dated April 11, 2006. That Ruling adopted the Fruitridge Vista Water Co. et al.'s motion (FVWC Motion) to modify the proposed settlement of record and accordingly changed PD.<sup>1</sup>

### **II. THE ISSUES**

- Is the PD consistent with established Commission ratemaking policy, when it authorizes FVWC to add \$1.98 million of buy-in fees to rate base and earn a profit on it, even though FVWC is expending none of its own funds to pay for such fees?
- Does the PD relinquish Commission ratemaking authority, when it approves in advance adding to rate base \$5 million of future and speculative lawsuit recoveries?
- Is the ALJ Ruling consistent with Commission Rules and affords DRA fair notice and due process, when it adopted the FVWC Motion to modify the evidence of record and accordingly changed the PD?

### **III. BACKGROUND**

On March 13, 2006, the assigned ALJ Glen Walker held an evidentiary hearing on the FVWC proposed settlement (PS) which was entered into evidence as Exhibit 1. At the hearing and in written testimony, DRA had objected to the PS as unreasonable, inconsistent with the law, and not in the public interest.<sup>2</sup> When adjourning the hearing,

---

<sup>1</sup> DRA's Opening and Reply Briefs in this proceeding, as well as its Response to Motion to Modify dated April 11, 2006, are incorporated by reference as if fully stated here.

<sup>2</sup> TR 86:4 – 87:15, J. Reiger/DRA.

ALJ Walker scheduled the filing of the Parties' Opening and Reply Briefs respectively on March 23 and March 27, and stated: "the case will be deemed submitted for decision after receipt of reply briefs."<sup>3</sup>

On March 23 and 27, 2006, the Parties filed their briefs. On March 28, 2006, ALJ Walker issued the Proposed Decision (PD) for comments. The PD adopted FVWC's proposal to currently increase rate base by \$1.98 million. The PD assumes that this amount represents the cost of the "buy-in fee" for water purchases from the City of Sacramento (City) that the City is financing. The PD allows FVWC to earn a profit of 11% on the \$1.98 rate base increase, even though FVWC expends none of its own funds to pay for the buy-in fee.

The PD rejects FVWC's proposal to rate base \$5 million of future litigation recoveries, if FVWC were to repay DHS that amount for receiving a Drinking Water Treatment and Research Fund (DWTRF) grant.<sup>4</sup> The PD held this proposal violates the Commission prohibition in D.06-03-015 against a public utility earning a profit on the use of public grants.<sup>5</sup> The PD stated: "we do not preclude the utility from seeking appropriate recovery for that investment in its next general rate case or in another proceeding."<sup>6</sup>

On April 5, 2006, FVWC filed a motion to modify the PS to state,

"[i]n the event that Fruitridge Vista is able to recover monies directly from polluters, the parties agree that plant funded by these monies , up to \$5.0 million, will be ratebased and earn a return of 10%."<sup>7</sup>

On April 28, 2006, the ALJ Ruling adopted this modification and revised the PD to provide, "[t]he funds at issue would not be a state grant at the time they are repaid to

---

<sup>3</sup> Tr. 158:25 – 26, ALJ Walker/Comm.

<sup>4</sup> PD at 8-9.

<sup>5</sup> PD at 16.

<sup>6</sup> *Id.*

<sup>7</sup> FVWC Motn to Modify at 12.

the Drinking Water Treatment and Research Fund.”<sup>8</sup> The PD as revised by the ALJ Ruling now appears to say that if FVWC recovers \$5 million in damages from its pollution lawsuit, this belongs to the FVWC owners and not the ratepayers. Further, if the FVWC owners elect to invest these damages in utility plant, rate base may be increased by a corresponding amount up to \$5 million.

In adopting the PS, the PD bars any subsequent legal challenges to the \$5 million or the \$1.98 million increases to rate base.<sup>9</sup> FVWC would not be required to prove the reasonableness and prudence of such future rate base increase. However, If FVWC were to invest litigation recoveries “into the system in excess of \$5 million, the parties are free to litigate the appropriate ratemaking treatment of assets financed by those funds in excess of \$5 million.”<sup>10</sup>

#### **IV. AUTHORITIES AND ARGUMENTS**

##### **A. The PD errs in adopting the proposed \$1.98 million rate base increase.**

##### **1. The PD is speculating that the City will finance \$1.98 million of FVWC’s buy-in fees for water purchases.**

The PD “assumes” that the City will finance FVWC’s \$1.98 million buy-in fees.<sup>11</sup> The record contains no executed financing agreement between FVWC and the City. More likely, FVWC will not need such City financing because FVWC will receive enough DWTRF grant and SRF loan monies to pay the buy-in fee. FVWC testified that the buy-in fees will amount to \$5.7 million.<sup>12</sup> However, DRA testimony proved that FVWC will pay \$3.7 million of this \$5.7 million with the DWTRF grant, and the

---

<sup>8</sup> *ALJ Ruling at 3*

<sup>9</sup> *FVWC Motn to Adopt at 8-9*

<sup>10</sup> *See FVWC Motn at 3-4.*

<sup>11</sup> *PD at 17.*

<sup>12</sup> *Ex. 1 at 2, 3, and 9.*

remaining \$2 million will come from the SRF loan.<sup>13</sup> At the hearing, Robert Cook Jr. corroborated DRA's proof as follows:

Q Page 7 of the settlement agreement, it does say that if you receive a loan from the State Revolving Fund, those proceeds will pay for the 2.11 mgd buy-in, whereas on page 11 of the motion, it does say the funds from the state -- from the State Revolving Fund and the Drinking Water and Treatment Fund will be forwarded to the City.

A That's right.

Q So is -- will those funds come from both sources, or will they only come from the State Revolving Fund sources?

A A portion of the \$3.7 million will come from the Drinking Water Treatment Fund, and then the remainder of the \$3.7 million will come from the State Revolving Fund.

It is therefore unfair to ratepayers for the PD to allow FVWC to recover in rates \$1.98 million and earn a profit (11%) on it, when the record establishes that the City will not need to finance FVWC's buy-in fee.<sup>14</sup> The Commission can and should wait to see FVWC actually enters into such a public financing arrangement. The PD errs in assuming the \$1.98 million is City financed, which appears to be the PD rationale for including it in rate base. The Commission should therefore reject the PD.

---

<sup>13</sup> Tr. 140:4 – 9, K. Evans/ DRA:

Again, Mr. Pfeiffer told me that 3.7 million is coming from the Research Fund, and that 2 million of the SRF funding will finish paying it off, such that there will be no need to have a financing of the 5.7, because it will be paid in full, assuming that the SRF funding comes through this summer.

*See DRA ReplyTestimy* at 13.

<sup>14</sup> *Cf id.* and *PD* at 9 (“The settlement assumes that the City of Sacramento will finance. . . .”)

**2. The PD has it backwards. FVWC must first expend its own funds on rate base before recovering and earning a profit on it at the ratepayers' expense.**

In *Alisal Water Corp.*, D.90-09-044, mimeo at 11, as quoted in California Water Service Company, D.94-02-045, 53 CPUC 2d 287 (1994), mimeo at 14, the Commission held:

[U]tilities should earn a return only on the money they invest . . . We found this policy superior to one which would allow utilities to earn a return on someone else's investment, whether it be plant [paid] for by the customers of the mutual water company being acquired, by customer donations, or by any other means.

In this case, the record shows that FVWC is not expending any of its own funds to pay the buy-in fees. The PD does not find otherwise. It is against Commission policy to have the ratepayers pay for FVWC's buy-in fees, without FVWC spending a dime of its own money for it. The Commission should therefore reject the PD as inconsistent with its ratemaking policy stated in the *Alisal* decision.

Alternatively, even assuming *arguendo* that the City is financing the buy-in fee, the PD should treat such public financing in the same ratemaking manner as it deals with the SRF loan. FVWC agrees that the SRF loan can only be surcharged and not rate based.<sup>15</sup> The City financing of the \$1.98 million is much a public financing as the SRF loan. Therefore, recovery of the buy-in fee should be surcharged to the ratepayers. Because the PD inconsistently treats the two public financing arrangements – State and local government – the Commission should reject the PD.

Rate basing the \$1.98 million imposes a more lasting rate burden on ratepayers than a surcharge. The PD is allowing FVWC earn a profit of 11% or more on the \$1.98 million for an indeterminate period. However, if the \$1.98 million were surcharged for rate recovery, FVWC may not earn a profit on it, and the surcharge would last only until

---

<sup>15</sup> See FVWC Op. Br. at 9.

the \$1.98 million is repaid to the City. Because the PD is imposing greater rate burdens, when a less onerous and more consistent alternative is available, the Commission should reject the PD or modify it to provide for surcharging the \$1.98 million of City financing.

**3. The PD misapplies the “offset rate increase.”**

The PD states, “we exercise our discretion to authorize an offset rate increase for this legitimate addition to base [i.e., the \$1.98 million] that is immediately necessary and useful on behalf of ratepayers.” As DRA Staff witness Kerrie Evans testified, “if it's [the offset rate increase] more than 25 percent of your annual income, we'd like you to come in and get authorization to do it.” In this case, an offset rate increase to recover \$1.98 million of revenue requirements exceeds 25% of FVWC annual income, which is approximately \$1 million per year. Therefore, FVWC would have to apply for an offset rate increase. The PD errs in applying the offset rate increase policy to FVWC. It waives the Commission requirement that FVWC has to show the reasonableness and justification for such ratemaking treatment. The Commission should reject the PD.

**B. The PD errs in adding \$5 million of speculative and future litigation recoveries to rate base.**

**1. The PD got it right the first time around. FVWC should apply in a future Commission ratemaking proceeding to rate base its pollution lawsuit recoveries. The ALJ Ruling’s reversal of the PD is arbitrary, unreasonable, and not in the public interest.**

The PD initially decided that FVWC should seek to recover pollution damages as rate base in another and future ratemaking proceeding:

[W]e do not preclude the utility from seeking appropriate recovery for that investment in its next general rate case or in another proceeding. We also do not preclude the utility from asserting, in an appropriate proceeding and based on then-existing facts, that a DHS grant that has been refunded by the utility is entitled to ratemaking treatment outside the prohibitions of D.06-03-015.

Inexplicably, the ALJ Ruling reverses the above holding, because FVWC's litigation recoveries up to \$5 million would not be a state grant at the time they are repaid to the DWTRF.<sup>16</sup> This change dispenses with FVWC having to undergo a Commission reasonableness and prudence review in a future ratemaking proceeding. The ALJ Ruling cites no findings of record or law to support this modification.

DRA finds it puzzling how the public interest is served, in adopting FVWC ratemaking proposals based on a speculative and future outcome of a pollution lawsuit and foreclosing any future reasonableness and prudence review by the Commission or DRA, if and when FVWC elects to invest its trial winnings in utility plant. For example, the jury trial in the pollution lawsuit is about to begin in late April 2006, and it is entirely conjectural when it will end and what the outcome will be. It is equally unpredictable what FVWC's capital structure will be when the trial ends or when FVWC recovers any damages. These imponderables militate against the PD's adoption of the PS. The Commission need not decide now the ratemaking issues associated with future and conjectured litigation recoveries.

**2. The record does not prove that if and when FVWC recovers in litigation \$5 million, this amount belongs to FVWC's owners or to the ratepayers.**

The PD errs in assuming that \$5 million of speculative and future litigation recoveries will belong to FVWC and not the ratepayers. The Commission is now deliberating on whether litigation recoveries won by a utility in a pollution lawsuit belong to the ratepayers or to the utility's owners. DRA raised this issue in its Opening Brief as follows:

It is also premature to assume that all monies received from the pollution litigation should be assigned to shareholders. For example, in the San Gabriel Water-Fontana District rate case the issue of the allocation of monies received from lawsuits associated with water contamination is currently being decided. Although no final decision has been issued in

---

<sup>16</sup> *ALJ Ruling* at 3.



the case, the Administrative Law Judge has already indicated to the parties that it would proposed to allocate 75% of the funds to ratepayers and 25% to shareholders. When and if FVWC were to receive any settlements or court awards, it should follow Commission processes and make the proper showing to increase rate base at that time.<sup>17</sup>

DRA does not understand the PD's rush to judgment. Deciding now the future treatment of FVWC litigation recoveries appear unrelated to any benefits of the PS, which the ALJ Ruling finds so presently compelling.<sup>18</sup> For example, the pollution lawsuit is a jury trial beginning in late April 2006 and involving over 20 law firms. It is improbable that the trial will end soon enough to have an impact on FVWC's present abilities to restore water pressure for health and fire safety.<sup>19</sup> Yet, the PD finds it to be of "overwhelming public interest" that the Commission authorize in advance a \$5 million rate base increase and waive the Commission's review of the prudence and reasonableness when that future event occurs. The Commission should reject the PD as unnecessary.

### **3. The ALJ Ruling denies DRA due process and violates Commission Rules when it adopted the FVWC Motion.**

The PD cites Rule 77.7 and Section 311(d) as providing for the parties' comments to be filed within 20 days of mailing so that the Commission can consider the PD at its meeting on April 27, 2006. Article 19 of the Rules, of which Rule 77.7 is a part, generally provides the procedures for "submission of any proceeding for a decision by the Commission." . According to Rule 47, a petition to modify is in order after the Commission has rendered a decision on this proceeding. These Rules are designed to afford fairness, notice, and an opportunity to be heard to all parties.

---

<sup>17</sup> *DRA Op. Br.* at 16.

<sup>18</sup> *ALJ Ruling* at 4.

<sup>19</sup> *See DRA Op.* at note 19.

In this case, the evidentiary hearing has ended, and the Parties have addressed the issues presented by the Scoping Memo and the Parties' testimonies in opening and closing briefs. Upon adjourning the hearing, the assigned ALJ stated, "the case will be deemed submitted for decision after receipt of reply briefs."

DRA finds no provision in the record, Rule 77.7, or otherwise in Article 19 allowing for the FVWC Motion to modify the record and to change the PD before the proceeding is decided by the Commission. The ALJ Ruling cites no legal basis for adopting the FVWC Motion. Therefore, the Commission should reject the PD as arbitrary.

## **V. CONCLUSION**

If FVWC is allowed to recover through rates and earn a profit on the \$1.98 million as rate base, when FVWC expended none of its own funds for this asset, this unreasonably increases the rate burdens on ratepayers. The records shows as doubtful that FVWC will need City financing of the \$1.98 million buy-in fee. In any case, the Commission should reject the PD and surcharge the \$1.98 million because it is less onerous and does not unjustly enrich FVWC.

The Commission need not rush to judgment and approve in advance \$5 million of speculative litigation recoveries. The outcome of FVWC's pollution lawsuit trial is so tenuous and its duration so unpredictable, it is equally as conjectural to now decide this ratemaking issue as advancing any public interest. The harms of the PS as adopted by the PD outweigh any of its purported benefits.

Respectfully submitted,

/s/ CLEVELAND W. LEE

---

Cleveland W. Lee  
Staff Counsel

Attorney for the Division of Ratepayer  
Advocates

California Public Utilities Commission  
505 Van Ness Ave.  
San Francisco, CA 94102  
Phone: (415) 703-1792  
Fax: (415) 703-2262

April 17, 2006

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of DIVISION OF RATEPAYER ADVOCATES' RESPONSE TO MOTION TO MODIFY in Application 05-10-005 et al. by using the following service:

☒ **E-Mail Service:** sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

☐ **U.S. Mail Service:** mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on April 17, 2006 at San Francisco, California.

\_\_\_\_\_  
/s/ ALBERT HILL

Albert Hill

**N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address and/or e-mail address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

\*\*\*\*\*